LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 26 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 593

MRS. RUBY L. PORTER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. PORTER, DECEASED,
Petitioner,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FRANK E. EVERETT, JR.,
Attorney for Petitioner,
BRUNINI, EVERETT, GRANTHAM & QUIN,
First National Bank Building,
Vicksburg, Mississippi.

Of Counsel:
WILLIAM W. RAMSEY,
RAMSEY, RAMSEY & BODRON,
Attorneys,
First National Bank Building,
Vicksburg, Mississippi,
JOHN B. FARESE,
Attorney at Law,
Ashland, Mississippi.

INDEX.

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
ARGUMENT	11
PRAYER	16
APPENDIX A	19

TABLE OF AUTHORITIES.

Armstrong vs. Chicago & W.I. RR., 183 NE 478	15
Brady v. Terminal Ry. Assn. of St. Louis, 303 U.S. 10, 58 S.Ct. 426 (1938)	15
Brailey v. B. & O. RR. Co. & N. Y. Central RR. System, 151 F.Supp. 431 (1957)	15
Byrne v. Penn. RR. Co., 262 F.2d 906	15
Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740 (1946)	15
Linstead v. Ches. & Ohio RR. Co., 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453 (1928)	15
Lovett v. Calloway, 69 F.Supp. 532 (1946)	15
Missouri, K. & T. R. Co. v. Grimes, 196 SW 961 (1917)	16
New Orleans & Northeastern Railroad Co. vs. Lewis, 58 So.2d 486	15
O'Conner v. Chicago, M. St. P. & R. Co., 251 NW 647 (1933)	16

TABLE OF AUTHORITIES—(Continued):

	Page
Oliver v. Northern Pac. RR. Co., 196 Fed. 432	16
Porter v. St. Louis-San Francisco Ry. Co., 354 F.2d 840 (1966)	16
Rogers v. Missouri Pacific Railroad Co., 77 S.Ct. 443, 352 U.S. 500	12
Shenker v. B. & O. RR. Co., 83 S.Ct. 1667, 347 U.S. 1	16
Sinkler v. Missouri Pacific Railroad Co., 78 S.Ct. 758, 356 U.S. 318	13
Weissinger v. Mansur & Tibbetts Implement Co., 75 Miss. 64, 21 So. 757	15
Wilson v. Terminal Ry. Assn. of St. Louis, 77 SE2d 429	16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No.

MRS. RUBY L. PORTER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. PORTER, DECEASED,
Petitioner,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered in the above entitled case on June 10, 1968, wherein judgment became final on June 25, 1968.

CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court is reported in 211 So.2d, page 530. A certified copy thereof will be found set forth in extenso in the Appendix, as Appendix A.

JURISDICTION.

There are special and important reasons for the review of the questions presented. They are questions of substance and to a degree they are federal questions of substance not heretofore determined by this Court, and they are federal questions decided by a subordinate court in a way probably not in accord with the applicable decisions of this Court.

The judgment of the State Supreme Court was rendered on June 10, 1968, and became final on June 25, 1968, a copy of Judgment is appended in extenso to this Petition as Appendix A.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Chapter 81, Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

The questions here really presented for review are, in fact, the validity of the Federal Employers' Liability Act. The question of whether or not the validity of this Act can be sustained if state courts are permitted by niggardly construction to thwart the uniform application of this federal statute adopted for the protection of vast thousands of railroad workers in an extremely hazardous interstate occupation, and the question of whether or not the Act can continue to afford protection to employees in a common interstate endeavor.

The questions are national in scope and involve the entire railroad transportation industry and hundreds

of thousands of workers that come within the purview of the federal legislation enacted for their protection.

In a more restricted and limited scope, however, is the serious question presented here with reference to the action of the Mississippi Supreme Court in ruling as a matter of law that the deceased, Porter, was not an employee of the Frisco and therefore not entitled to the protection of the Federal Employers' Liability Act.

The questions presented are, of course, vital to the dependent next to kin of Porter, but even more far reaching, they are vital and go to the heart of the question of whether or not the Federal Employers' Liability Act, which was passed for the protection of railroad workers in this country, is valid and enforceable and affords the protection intended by Congress when niggardly and narrow and restricted interpretation of the Act by lower courts are permitted to stand.

STATUTES INVOLVED.

The federal statute involved here is the Federal Employers' Liability Act, 45, United States Code Annotated Section 51, page 150, reading as follows: to-wit;

> §51. Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Definition of Employees.

"Every common carrier by railroad while engaging in commerce between any of the several

States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the

benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

STATEMENT OF THE CASE.

This cause of action was remanded from the United States District Court for the Northern District of Mississippi by order of the United States Court of Appeals to the Circuit Court of Marshall County, Mississippi, where it was tried before a jury and a verdict was returned in favor of the Plaintiff in the amount of One Hundred Thirty Thousand ($130,000.00) Dollars, on which judgment was ordered on the 17th day of November, 1966, from which Defendant appealed to the Supreme Court of Mississippi which reversed the judgment below and rendered judgment for the Defendant.

For the purpose of brevity in this brief the deceased shall be referred to as Porter, the Union Railway Company as Union and the St. Louis-San Francisco Railway Company as Frisco.

This is a suit brought by the Administratrix of the Estate of Porter against the Frisco under the Federal Employers' Liability Act for the wrongful death of Porter by reason of negligence on the part of the Frisco which, either in whole or in part, brought about the death of Porter on the night of September 8th or rather the very early hour of approximately

12:30 A.M. on the morning of September 9, 1961 (R. 39, 44). Porter was a member of Union switch crew which at the time of the accident was making a delivery, known as the Frisco delivery, into the Frisco's K. C. Junction Yard in the City of Memphis, Tennessee and was at the time performing work and service for the use and benefit of the Frisco in making the delivery of such cars and for which services by said switching crew the Frisco paid the Union switching charges in the amount of $88.83 (R. 75).

The Union crew, including Porter, while operating over the tracks of the Frisco in K. C. Junction Yard and in Frisco's McLemore No. 1 track to which this particular delivery was being made, was under the direction, control and supervision of the Frisco Railroad and operating under its Book of Rules. Under these circumstances the Union switching crew, including Porter, were bound to take instructions and directions from any officers, agents or employees of the Frisco while so operating over Frisco's track (R. 148, 160, 161, 170, 171, 188, 207, 208, 212, 213, 214, 215).

On the occasion in question Porter and his crew were shoving a cut of some 39 cars in an easterly or southeasterly direction along McLemore No. 1 track in the darkness of the night time. Porter was riding on the third car from the lead end or southeasterly end of the cut of cars. The engine or locomotive was on the west end shoving the cut in a southeasterly direction. Upon entering the K. C. Junction Yard owned by the Frisco, a Frisco agent and yard clerk,

one Mr. York, advised Porter and his crew that Frisco's McLemore No. 1 track into which the delivery was being made was clear except for one car at the far end. In truth and in fact, however, the said car was not at the far end of McLemore No. 1 track, but was approximately 20 or 25 car lengths (R. 370) or nearly one quarter of a mile from the far end or east end of McLemore No. 1 track positioned in the darkness behind a building and around a curve from the direction from which the shove was being made. Porter's train or cut of cars upon which he was riding collided with said car with great force and violence and Porter was knocked from the top of said third car and run over by his train, severing his body at the waist. Eleven cars were shoved over Porter's body before the train was brought to a stop.

There were no eyewitnesses to the accident, but the last person to see Mr. Porter alive was his foreman, Mr. Scoggins, who saw him performing his duties riding about one-third of the way back on the third car from the lead end of the cut just moments before his death (R. 362).

There was positive evidence that the first car to pass over Porter's body was the fourth car from the east end of the cut as indicated by the first evidence of blood on the leading wheels on the east end and north side of the fourth car in the cut of cars. It is beyond dispute that Porter's cut collided with and coupled into the car which was sitting in McLemore No. 1 track (R. 102, 103). This was a Frisco hopper

car which was placed in Frisco's McLemore No. 1 track by the Frisco crew earlier that night. The only dispute that arises with reference to this car is to its precise location on McLemore No. 1 track at the moment of the collision between it and Porter's cut. Witnesses Harris and Boggs testified very graphically as to where the collision between the cars occurred in their testimony that grayish white dust or material was on the track at the point where the collision occurred and the identical grayish white substance or material was all over the Frisco covered hopper which was sitting in the track loaded with feed and with both the hand brakes and the airbrakes applied on it at the time of the collision (R. 147). These witnesses also testified that they measured the distance from the grayish white substance on the track and it was three car lengths east of Porter's body (R. 152, 153). There was a dispute by the Defendant's witnesses, Foley and Chalk, that the Frisco hopper car was left at the point where the grayish white substance was found on the track. Their testimony was that the car was some 200 feet east of this point, but this testimony was inconsistent with their sworn testimony on deposition that the Frisco car was left on No. 1 track approximately 10 or 12 car lengths east of Bellevue Overpass, which would have placed it almost precisely where witnesses Boggs and Harris testified that they discovered the grayish white substance on the track.

Porter, at the time he met his untimely and wrongful death, although a member of the Union switch-

ing crew, was performing work and service for the use and benefit of the Frisco operating over the Frisco's track making the Frisco delivery under the Frisco's Uniform Code of Operating Rules under the Frisco's direction, supervision and control and taking directions from an agent of the Frisco which agent negligently and carelessly gave Porter and his crew misinformation as to the location of the Frisco hopper car on Frisco's No. 1 track and Porter's death was brought about, either in whole or in part, as a result of such negligence on the part of the Frisco. Porter was clearly an employee of the Frisco for the purposes of the Federal Employers' Liability Act and his widow as Administratrix of his estate had a right to invoke its privileges and benefits by propounding her claim against the Frisco in the Circuit Court of Marshall County, Mississippi.

The federal question sought to be reviewed was first raised at the close of Plaintiff's testimony in the Circuit Court of Marshall County, Mississippi, at which time Defendant moved for a pre-emptory instruction to find for the Defendant (R. 217, 218, 219). In overruling the motion the Court said (R. 218):

The Court:

"Overruled. Do you want to be heard?"

Mr. Bolton:

"Yes sir, but you have already overruled it."

The Court:

"Well, I'm going to be frank with you, Mr. Bolton. I think it is a jury question and I am going to let it go to the jury."

Mr. Bolton:

"Now comes the Defendant and moves the Court to find as a matter of law that the Plaintiff was not an employee of the Defendant."

The Court:

"Overruled." (R. 219.)

At the conclusion of all the testimony (R. 406) the Respondent moved the Court to direct a verdict in its favor on the grounds that the Plaintiff failed to show that the deceased was an employee of the Defendant and that no evidence of negligence was shown. The Court reserved its ruling and asked whether or not the Plaintiff had a motion (R. 407), wherein the Plaintiff moved for a directed verdict and that the Court direct the jury that at the time of his death, that Porter was an employee of the Frisco and that he had a right to maintain an action to recover against the Frisco under the Federal Employers' Liability Act. In so doing, both sides waived a jury determination on this issue.

After hearing argument on the motion, both for the Plaintiff and for the Defendant, the Court ruled (R. 407, 408) that as a matter of law and fact Porter was an employee of the Frisco and submitted the case to the jury on the question of negligence and quantum.

The question was again brought up in Motion for New Trial (R. 470, 471) as enumerated in paragraph 8, 9, 10 and 11 of the motion to the effect that the Court erred in finding as a fact and as a matter of law that James A. Porter was an employee of the St. Louis-San Francisco Railway Company and therefore his Administratrix was entitled to bring this action under the Federal Employers' Liability Act.

Motion for New Trial overruled (R. 473).

The federal question was again presented on appeal to the Supreme Court of Mississippi where lengthy briefs were filed and arguments presented on both sides, pro and con, with reference to whether or not Porter was an employee of the Frisco under the terms and provisions of the Federal Employers' Liability Act. The Mississippi Supreme Court, utterly and totally at odds with a long line of federal decisions on this question, entered a judgment in accordance with the contentions of the Respondents, reversing the finding of fact and ruling as a matter of law that Porter was not an employee of the Frisco, reversing the judgment of the Circuit Court of Marshall County and rendering a judgment in favor of the Respondent.

ARGUMENT.

The cases sustaining jurisdiction of this Court on review of federal questions as involved here in the interpretation, application and validity of a federal

statute drawn into question; viz, the Federal Employers' Liability Act are numerous, but perhaps the clearest language was set out in the case of *Rogers vs. Missouri Pacific Railroad Company,* 77 S.Ct. 443, 352 U.S. 500, wherein it is stated that this Court will grant certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. The kind of misconception evidenced by the opinion of the Mississippi Supreme Court fails to take into account the special features of this statutory negligence action which make it significantly different from the ordinary common-law negligence action. The Mississippi Court has not given proper scope to this integral part of the congressional scheme.

The Mississippi Court chose to ignore these judicial mandates. Here we see special and important reasons for review by certiorari of the judgment of the Mississippi Court which has decided a federal question of substance in a way probably not in accord with and in direct conflict with the applicable decisions of this Court.

Railroading is a unitary enterprise operating in interstate commerce, its economic resources obligated to bear the burden of all injuries befalling those engaged in this hazardous occupation arising out of the fault of any other member engaged in the common endeavor. Justice demands that one who gives his labor to the furtherance of such enterprise should be assured that all combining their exertions

with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be in danger.

This is essentially the language of this Court in the case of *Sinkler vs. Missouri Pacific Railroad Company*, 78 S.Ct. 758, 356 U.S. 318. The language "any other member engaged in the common endeavor" and "all combining their exertions with him in the common pursuit" is certainly language that should embrace the carrier as well as the carrier's employees.

Much apparent confusion still exists in this country despite the many rulings of this Court as to whether or not railroad employees engaged in interstate commerce are afforded the protection of the Federal Employers' Liability Act when they are injured by another railroad on the tracks or property of the other railroad. If this protection of these interstate employees is not afforded by the Federal Act, thousands of them daily are exposed to the hazards inherent in their occupation while on the tracks or property of other railroads and are wholly without the protection which congress sought to afford by the passage of the Federal Employers' Liability Act. If such is the case, there is no uniformity of law affording them protection of their rights when injured by a carrier other than the one by whom they are directly employed. They are subject to a hodgepodge of local judicial remedies, and they are subject to the many grave injustices that congress

sought to prevent by the enactment of a uniform federal statute by the passage of the Federal Employers' Liability Act.

It is a general practice of all railroads of the United States that the receiving carrier deliver to the connecting carrier interchange cuts or groups of cars to be forwarded and delivered by the railroad receiving the cars on the interchange tracks and the employees making these deliveries are under the directions, rules and supervision and control of the receiving road. This duty is regularly performed by all railroad employees of the United States in the unity of service in moving interstate across the nation.

It is a settled rule of law in both federal and state courts that both the defendant and the plaintiff have the right to waive a jury on any issue and the trial court in this instance acts as a jury and a finder of facts, and when by motion of either side requests a finding of the facts by the court waiving the jury and this motion is joined in by the other party to the litigation, then the finding of facts by the court is in the same category as finding of facts by jury. In Mississippi this is statutory.

Mississippi Code, 1942 Annotated, Section 1521. Trial of Facts by the Court.

"Trial by jury may be waived by the parties to an issue of fact in actions on contract, and with the assent of the court, in other actions."

Serious error was committed by the State Supreme Court in reversing the lower court's finding as a matter of law and fact that Porter was an employee of Frisco.

This question was settled long ago in Mississippi in the case of *Weissinger vs. Mansur & Tibbetts Implement Company*, 75 Mississippi 64, 21 So. 757, wherein it was held that where a jury is waived, the Supreme Court will attach the same weight to the finding of the judge as to the verdict of a jury. Also see *New Orleans & Northeastern Railroad Company vs. Lewis*, 58 So.2d 486, holding that the Supreme Court cannot substitute its judgment for that of jury on issue of fact.

Cases supporting Petitioner's position with reference to joint employee relationship authorizing action against non-employing carrier under the Federal Employers' Liability Act, are listed below:

Armstrong v. Chicago & W.I. RR., 183 NE 478;
Brady v. Terminal Ry. Assn. of St. Louis, 303 U.S. 10, 58 S. Ct. 426 (1938);
Brailey v. B. & O. RR. Co. and N. Y. Central RR. System, 151 F.Supp. 431 (1957);
Byrne v. Penn. RR. Co., 262 F.2d 906;
Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740 (1946);
Linstead v. Ches. & Ohio RR. Co., 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453 (1928);
Lovett v. Calloway, 69 F.Supp. 532 (1946);

Missouri, K. & T. R. Co. v. Grimes, 196 SW 961 (1917);

O'Conner v. Chicago, M. St. P. & R. Co., 251 NW 647 (1933);

Oliver v. Northern Pac. RR. Co., 196 Fed. 432;

Porter v. St. Louis-San Francisco Ry. Co., 354 F.2d 840 (1966);

Shenker v. B. & O. RR. Co., 83 S.Ct. 1667, 347 U.S. 1;

Wilson v. Terminal Ry. Assn. of St. Louis, 77 SE2d 429.

A federal question of substance is involved here and the validity of a federal statute is clearly in question.

PRAYER.

Wherefore, your Petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Mississippi, commanding said Court to certify and send to this Court a transcript of the record in the case entitled "St. Louis-San Francisco Railway Company, Appellant vs. Mrs. Ruby L. Porter, Administratrix of the Estate of James A. Porter, Deceased, Appellee, No. 6117," including also the proceedings in said Supreme Court to the end that said cause may be reviewed and determined by this Court and the judg-

ment of the Circuit Court of Marshall County, Mississippi, be reinstated here.

Respectfully submitted,

FRANK E. EVERETT, JR.,
Attorney for Petitioner,

BRUNINI, EVERETT, GRANTHAM & QUIN,
First National Bank Building,
Vicksburg, Mississippi.

Of Counsel:
WILLIAM W. RAMSEY,
RAMSEY, RAMSEY & BODRON,
Attorneys,
First National Bank Building,
Vicksburg, Mississippi.
JOHN B. FARESE,
Attorney,
Ashland, Mississippi.